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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JOHN PETTITT, MURPHY LABRADOR
CORPORATION, MAX GSD TRUST OF
1998 BY BARBARA MUSSER,
TRUSTEE,
Plaintiffs,
v.
JOHN CHIANG, individually and in his
capacity as STATE CONTROLLER OF
THE STATE OF CALIFORNIA,
Defendant.

Case No.: 07-CV-05854 CW

**MEMORANDUM OF POINTS AND
AUTHORITIES IN REPLY TO
OPPOSITION FOR EXTENSION OF
TIME TO FILE A NOTICE OF
APPEAL**

Date: August 14, 2008
Time: 2:00 p.m.
Dept: 2, Fourth Floor
Judge: The Honorable Claudia Wilken

Defendant misperceives the application being made by Plaintiffs. If Defendant were correct that no effort had been made by Plaintiffs until July 10, 2008, 49 days after the last date for filing the Notice of Appeal, Defendant's point might well be taken. Significantly and compellingly, that is not the situation in the present case.

Rather, as set forth in the moving papers and the accompanying Declarations of John Arneson and Rita Coe, previously filed herein, a timely attempt was made to file the Notice of Appeal on May 20, 2008. Plaintiffs' reference to the receipt of a Notice of Appeal by the clerk of this Department on May 21, 2008 reflects that Plaintiffs did not overlook nor neglect the date,

1 but that its efforts were unavailing according to the electronic files of the U.S. District Court,
2 apparently because the system refused the e-filing on May 20, 2008.

3 In further support of Plaintiffs' application and to establish their timely effort on May 20,
4 2008, as set forth in the Declaration of Terence Hanrahan submitted with this reply, the computer
5 of Ms. Coe has in its cache file a time stamp entered indicating an attempt at an ECF filing on
6 May 20, 2008.

7 The authorities cited by Defendant restricting the court from extending the statutory
8 period are inapplicable and miss the point of Plaintiffs' motion in this instance. Plaintiffs have
9 no alternative but to seek the present motion for an Order Permitting a Late Filing of a Notice of
10 Appeal since the court records do not reflect that the appeal was filed. Accordingly, whether this
11 motion seeks an extension to validate the May 20, 2008 efforts of filing, or an equitable ruling by
12 the court that the filing was effective as of May 20, 2008, the relief sought by Plaintiffs remains
13 the same.

14 Plaintiffs' request is that the court review the record and agree that the May 20, 2008
15 filing was a functional equivalent of the filing of a Notice of Appeal. But since the filing fee was
16 not paid on May 20, 2008, and the court's electronic record does not currently reflect the Notice
17 of Appeal, there are administrative matters yet to be completed to fully recognize the filing of the
18 Notice.

19 Plaintiffs' reliance in its moving papers on Federal Rule of Appellate Procedure 3(c) and
20 on *Smith v. Barry* 502 U.S. 244, 248, 112 S. Ct 678, 116 L. Ed 2nd 678 (1992), are well-founded.
21 *Smith* described the formal requirements for filing a Notice of Appeal, all of which are better
22 satisfied in the instant case than under *Smith's* facts. In *Smith*, the Supreme Court accepted a
23 brief filed in the Appellate Court, in response to a "briefing order" to be the functional equivalent
24 of a filing which should have been made in the District Court. In the instant case, Plaintiffs did
25 everything necessary to timely file the Notice of Appeal. For whatever reason, the e-filing
26 system failed to accept it. The only procedural lapse was not sending in the filing fee, but that is
27 not a jurisdictional defect, and can be cured immediately.

1 For the reasons stated, the court should grant this motion, which may technically be
2 required to be characterized as an “extension”, to validate and complete Plaintiffs’ filing efforts
3 of May 20, 2008.

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5 Dated: July 30, 2008

Respectfully submitted,
DOHERTY GEORGESON KERLEY LLP

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